

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:

No. 23535-1-III

**JORJA LEE (TULLOCK)
WILKINSON,**

Appellant,

and

SEAN DION TULLOCK,

Respondent.

Division Three

UNPUBLISHED OPINION

SCHULTHEIS, A.C.J. — Sean Tullock, the residential parent of two children, decided to relocate with the children from the Tri-Cities area of Washington to Idaho. Jorja Wilkinson, the mother of the children, unsuccessfully moved to prohibit relocation. On appeal, she contends the trial court abused its discretion in concluding that the relocation was justified under RCW 26.09.520. We find that the trial court properly considered each of the factors in RCW 26.09.520, and affirm.

Facts

When Mr. Tullock and Ms. Wilkinson divorced, Mr. Tullock was granted residential custody of the couple's two children, ages seven and four. Both parents lived at that time in Benton County, Washington. Due to a criminal charge, Mr. Tullock lost his job as a radiological control technician at Hanford and was unable to find similar work in the county. Additionally, he needed to sell his house pursuant to the divorce settlement.

In February 2004, Mr. Tullock filed a notice of his intended relocation of the children to Idaho Falls, Idaho. Ms. Wilkinson responded by moving for an order prohibiting relocation. A hearing was held in the Benton County Superior Court in September 2004. After applying the factors of RCW 26.09.520, the trial court denied Ms. Wilkinson's motion, authorized permanent relocation of the children to Idaho, and adjusted the final parenting plan to provide Ms. Wilkinson more time with the children during the summer. This appeal timely followed.

Relocation of the Residential Parent

A residential parent who wishes to move with the child away from the other parent is required to notify the other parent (and every other person entitled to residential time or visitation with the child) that he or she intends to relocate. RCW 26.09.430. If the other parent objects to the intended relocation and files the objection with the court, the relocating parent must provide reasons for the relocation. RCW 26.09.480, .520. The

relocating parent benefits from a rebuttable presumption that the intended relocation will be permitted. RCW 26.09.520. To rebut that presumption, the objecting parent must demonstrate that “the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.” RCW 26.09.520.

In determining whether the intended relocation is more beneficial for the child and the relocating parent, the court must examine the 11 factors of RCW 26.09.520. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004). These factors, which are not weighted or listed in any particular order, include the following:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child’s relationship with each parent, siblings, and other significant persons in the child’s life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child’s physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child’s relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

RCW 26.09.520. We note that the standard for relocation decisions is not just the best interests of the child, but also the interests and circumstances of the relocating parent.

Horner, 151 Wn.2d at 894-95 (quoting *In re Custody of Osborne*, 119 Wn. App. 133, 144-45, 79 P.3d 465 (2003)).

The trial court here considered the factors of RCW 26.09.520 and concluded that the benefits of the move outweighed the detriments. This court reviews the trial court's decision for abuse of discretion. *Horner*, 151 Wn.2d at 893. To determine whether the trial court abused its discretion, we ask two questions: "Did the trial court enter specific findings of fact on each factor? If not, was substantial evidence presented on each factor, and do the trial court's findings of fact and oral articulations reflect that it considered each factor?" *Id.* at 896. As shown below, the trial court either entered specific findings or considered each factor of RCW 26.09.520 in deciding that relocation was justified.

1. Relative relationships of the two parents to the children. The trial court found that Mr. Tullock and Ms. Wilkinson had similar relationships with their children, but that Mr. Tullock's relationship was more compelling due in part to his role as the residential

parent. Although the trial court mistakenly remembered that the older child's teacher considered Mr. Tullock the more involved and devoted parent, the teacher actually declined to testify that one parent was more involved than the other. She did state, however, that Mr. Tullock was very devoted to the children and spent more time with them because he was the custodial parent. The trial court also found that the children had stronger relationships with the Idaho Falls relatives than with the significant others (including friends) located in the Tri-Cities. These findings are supported by substantial evidence.

2. Prior agreements. As the trial court noted, the parties had no prior agreements, so this factor is inapplicable.

3. Whether disrupting the children's contact with the relocating parent would be more detrimental than disrupting the children's contact with the objecting parent. As the trial court stated, "Basically this has to be a balance whether it's worse to separate [from] the father or the mother if we're going to have a separation." Clerk's Papers (CP) at 8. Noting the statute presumes that the residential parent's decision to relocate the children is permissible, the trial court found no reason to separate Mr. Tullock from his children just so they could maintain their contacts with their mother and the few significant others in the Tri-Cities. Ms. Wilkinson contends the children's counselor warned that reduced contact with the mother could cause problems for the children. Actually, in balancing the

pros and cons of relocation, the counselor merely stated that reduced contact with their mother could cause “regressive behaviors and heightened emotional reactions to the divorce.” CP at 75. On the other hand, the counselor opined that the children have enough emotional stability to adjust to relocation, and noted that the move would benefit the family financially and would be supported by the extended family in Idaho Falls. The children’s guardian ad litem testified similarly in support of relocation. Thus, substantial evidence supports this finding.

4. Whether either parent is subject to limitations under RCW 26.09.191 (for abandonment, abuse, domestic violence, etc.). Neither parent is subject to limitations, so this factor is inapplicable.

5. Reasons for relocation and the good faith of the parties. Although the trial court admitted that there may be an element of a power struggle here between the parties, it found that both parents operated out of good faith in requesting and opposing relocation. In particular, the court found that Mr. Tullock needed to sell his expensive house in the Tri-Cities and could get immediate and quality housing for free in Idaho Falls. The trial court also found that the Idaho Falls school district was of comparable quality to the school the children attended in the Tri-Cities. These “two very good reasons” for moving are supported by substantial evidence and likewise support the trial court’s finding of good faith. CP at 9.

6. The developmental stages and needs of the children and the likely impact of relocation. As the trial court stated, the record shows that the children do not have special needs other than high academic potential, and that the Idaho Falls school district is capable of meeting those needs. By allowing the older child to finish the school year in the Tri-Cities before moving, Mr. Tullock helped her to make a smooth transition. Ms. Wilkinson contends her older child was bored during her first week in the Idaho Falls school, and argues that this child needs more contact with her mother as she develops through puberty. However, Ms. Wilkinson does not explain how these concerns overcome the presumption that relocating with the residential parent is preferable. RCW 26.09.520. Neither the counselor nor the guardian ad litem expressed concern with the older child's ability to navigate puberty, and Ms. Wilkinson provides no evidence that the Idaho Falls school failed to meet the child's needs after the first week. Ultimately, Ms. Wilkinson fails to show that the detrimental effect of the move overcomes the benefits to the children.

7. The quality of life and opportunities available to the children and the relocating parent in the current and proposed residences. Ms. Wilkinson contends Idaho Falls offers few employment opportunities to her outside the nearby nuclear power plant, and claims the Idaho Falls schools are inferior to those in the Tri-Cities. The trial court found no significant differences in the quality of life or opportunities available in the two areas.

This finding is supported by the recommendation of the guardian ad litem and by Mr. Tullock's mother, a retired Idaho school teacher. Further, the employment opportunities for Ms. Wilkinson are not relevant to this factor. Mr. Tullock's opportunities probably are broader in Idaho Falls than in the Tri-Cities, where he was fired for misconduct on the job at Hanford. On balance, the record supports the trial court's finding that opportunities offered in the Tri-Cities do not overcome the benefits of moving to Idaho Falls.

8. Availability of alternative arrangements to foster the children's relationship with their mother. Ms. Wilkinson does not assign error to the trial court's decision to modify visitation under this factor so as to increase her time with the children.

9. Alternatives to relocation and whether the objecting parent would find it feasible or desirable to relocate as well. The trial court did not specifically enter a finding on this factor after the September 2004 hearing on permanent relocation. Accordingly, this court must examine whether substantial evidence was presented on this factor and whether the trial court's statements and findings reflect that the factor was considered. *Horner*, 151 Wn.2d at 896.

The guardian ad litem testified at the hearing that although Ms. Wilkinson's parents live in Idaho Falls and she could probably pursue her college studies there, Ms. Wilkinson did not want to move because her boyfriend lived in the Tri-Cities and she felt

returning to her parents would be regressive. As discussed under other factors, Mr. Tullock's alternative to relocating was to find housing in the Tri-Cities with little prospect of employment. At the April 2004 hearing on temporary relocation, the trial court discussed this factor and found that Ms. Wilkinson could move to Idaho Falls to be near her family and children. In light of the evidence elicited at the September hearing and the finding on this factor made at the April hearing on temporary relocation, it is evident that the trial court considered the alternatives to relocation and found that Mr. Tullock pursued the better choice by moving to Idaho Falls.

10. Financial and logistical impact of the relocation. The record supports the trial court's finding that moving to Idaho Falls was beneficial to Mr. Tullock and the children because he could be more self-sufficient there. Housing would be free while he worked for his parents and pursued education or employment.

11. For a temporary order, the length of time before a final order. Because this is a final order on relocation, this factor is inapplicable.

To summarize, each of the trial court's findings on the factors of RCW 26.09.520 is supported by substantial evidence. Factor 9, although not mentioned at the September 2004 hearing on permanent relocation, was considered by the trial court at the hearing on temporary relocation. Moreover, the guardian ad litem discussed this factor at the September hearing when she testified that Ms. Wilkinson was not interested in moving to

Idaho Falls, no matter what opportunities were there for her. Because the trial court considered each factor of RCW 26.09.520, and each factor was supported by the evidence, the court did not abuse its discretion in granting Mr. Tullock's request for permanent relocation.

Attorney Fees

Mr. Tullock requests attorney fees on appeal based on need under RCW 26.09.140 and on Ms. Wilkinson's alleged intransigence. RCW 26.09.140 provides that an appellate court may order one party to pay the costs to the other party of maintaining the appeal—including attorney fees—after considering the relative financial circumstances of the parties. *In re Marriage of Rideout*, 150 Wn.2d 337, 357-58, 77 P.3d 1174 (2003). Mr. Tullock failed to submit the financial statement required by RAP 18.1(c) for consideration of his need and Ms. Wilkinson's ability to pay. Consequently, we deny attorney fees based on need.

Regardless of financial ability, attorney fees are also awardable when one parent's intransigence causes the other parent to incur additional legal services. *In re Marriage of Schumacher*, 100 Wn. App. 208, 216-17, 997 P.2d 399 (2000). Washington courts have found intransigence when one party engages in obstructive behavior or delay tactics, files unnecessary motions, fails to cooperate with the attorney, or participates in other activities that make trial unduly difficult or that increase legal costs unnecessarily. *See*,

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e.g., In re Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997); *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996); *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

Mr. Tullock contends the fact that Ms. Wilkinson is appealing a discretionary decision proves her intransigence. On the contrary, review of the trial court's exercise of discretion requires examination of the evidence to support the findings of fact. Some of the findings here are neutral—neither supporting nor defeating relocation. And one finding, on factor 9, was not specifically entered. Consequently, Ms. Wilkinson's challenge to the findings was not frivolous and does not constitute intransigence. Mr. Tullock is not entitled to attorney fees on this basis.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, A.C.J.

WE CONCUR:

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Kato, J.

Kulik, J.